## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

HISPANICS	UNITED	OF BUFFALO.	INC
HISTANICS	UNITED	OF BUFFALO.	INC.

and

Case 3-CA-27872

CARLOS ORTIZ, AN INDIVIDUAL

## RESPONDENT, HISPANICS UNITED OF BUFFALO, INC.'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent, Hispanics United of Buffalo, Inc., (hereinafter referred to as "HUB") by and through their attorneys at LoTempio & Brown, P.C., hereby submits the following Exceptions to the Administrative Law Judge's Decision (hereinafter referred to as "ALJD") dated September 2, 2011.

- 1. ALJD at pg. 2: 25-27 The ALJ's finding of jurisdiction over Respondent on the basis of the Federal Funds it receives for providing services in Buffalo, New York.
- 2. ALJD at pg. 2: 30-31 The ALJ's finding of jurisdiction over Respondent on the basis that it purchased more than \$60,000.00 annually from entities which are engaged in interstate commerce.
- 3. ALJD at pg. 4: 18-22 The ALJ's finding that Mariana Cole-Rivera and Cruz-Moore very often sent text messages to each other with Cruz-Moore being critical about the job performance of other HUB employees, primarily those in respondent's housing department and that early on the morning of Saturday, October 9, Cruz-Moore told Cole-Rivera that she was

going to raise these concerns with Respondent's Executive Director, Lourdes Iglesias.

- 4. ALJD at pg. 4: 25-27 The ALJ's finding that on August 2, 2010, Cruz-Moore criticized Ludimar Rodriguez' job performance.
- 5. ALJD at pg. 4: 29-31 The ALJ's finding that Damicela Rodriguez had a conversation with Cruz-Moore in late September or early October in which Cruz-Moore complained that HUB staff members were not doing their jobs.
- 6. ALJD at pg. 4: 31-32 The ALJ's finding that Cruz-Moore complained to Carlos

  Ortiz about the job performance of employees in Respondent's housing department.
- 7. ALJD at pg. 6: 22-27 The ALJ's finding that Cruz-Moore attempted to get HUB Executive Director, Lourdes Iglesias, to terminate or at least discipline the employees who posted the comments on Facebook prior to their termination and the claim that "it is not clear why she bore such animosity against the other employees, most of whom did not mention her name in their posts."
- 8. ALJD at pg. 6: 31-32 The ALJ's finding that Mariana Cole-Rivera's lie about attempting to speak to Iglesias on October 12 prior to the meeting which she was terminated does not materially affect the outcome of this case.
- 9. ALJD at pg. 6:33-35 The ALJ's finding that Iglesias did not terminate the employment of her secretary, Jessica Rivera, who had also entered a post on Cole-Rivera's Facebook page on October 9.
- 10. ALJD at pg. 6: 37-40 The ALJ's finding that Iglesias told each of the employees that Cruz-Moore had suffered a heart attack as a result of their harassment and that Respondent was going to have to pay her compensation and that for these reasons she would have to fire them.

- 11. ALJD at pg. 6: 41-44 The ALJ's finding that there was no causal relationship between whatever health problems Cruz-Moore may have been experiencing from the Facebook posts and that Lourdes Iglesias had no rational basis for concluding the Facebook posts had any relationship to Cruz-Moore's health.
- 12. ALJD at pg. 8: 5-6 The ALJ's finding that the only substantive issue in this case, other than jurisdiction, is whether by their postings on Facebook the five employees engaged in activity protected by the act.
- 13. ALJD at pg. 8: 10-12 The ALJ's conclusion that the Facebook communications and reaction to a co-worker's criticism of the manner in which HUB employees perform their jobs was protected.
- 14. ALJD at pg. 8: 14-15 The ALJ's finding that the fact that the terminated employees were not trying to change their working conditions and that they did not communicate their concerns to Respondent is irrelevant.
- 15. ALJD at pg. 8: 15-20 The ALJ's finding that employee complaints concerning schedule changes made by the employer are analogous to the griping by the employees that were terminated by Respondent.
- 16. ALJD at pg. 8: 22-44 The ALJ's reliance on prior board decisions that are each completely different than the factual circumstances herein which did not pertain to discussions of hours, wages or working conditions by the employees whom Respondent terminated.
- 17. ALJD at pg. 8:4-8; pg. 9:5-7 The ALJ's finding that the terminated employees were taking a first step towards group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management.

- 18. ALJD at pg. 9: 6-7 The ALJ's finding that Respondent's termination of the employees prevented them from taking any further group action based on Cruz-Moore's criticisms.
- 19. ALJD at pg. 9: 12-16 The ALJ's finding that the protection of Sections 7 and 8 of the Act does not depend on whether organizing activity was ongoing, whether the employees herein had brought their concerns to management before they were fired, or that there is no express evidence that they intended to take further action, or that they were not attempting to change any of their working conditions.
- 20. ALJD at pg. 9: 18-21 The ALJ's finding that the employees have a protected right to discuss matters affecting their employment and that explicit or implicit criticism by a coworker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7.
- 21. ALJD at pg. 9: 21-22 The ALJ's finding that the terminated employees had an expectation that Cruz-Moore might take her criticisms to management.
- 22. ALJD at pg. 9: 22-24 The ALJ's finding that the employees were terminated by Respondent for discussing Cruz-Moore's criticisms of HUB's employees work in violation of Section 8(a)(1).
- 23. ALJD at pg. 9:45-47; pg. 10:5-29 The ALJ's finding that Respondent had no rational basis for concluding that the employees violated the zero tolerance of discrimination policy, that the Respondent was looking for an excuse to reduce its workforce and seized upon the Facebook posts as an excuse for doing so, and that there was no probative evidence as to the nature of Cruz-Moore's health problem following the Facebook posts that would justify the termination of the employees.

- 24. ALJD at pg. 10: 33-34 The ALJ's finding that Respondent discriminatorily discharged the employees and must offer them reinstatement and make them whole for any loss of earnings and other benefits.
- 25. ALJD at pg. 10: 34-37 The ALJ's finding that the terminated employees are entitled to back pay with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).
- 26. ALJD at pg. 11: 5-10 The ALJ's recommended cease and desist Order, paragraph 1(a) and (b).
- 27. ALJD at pg. 11:12-45: pg. 12:5-13 The ALJ's recommended affirmative action, paragraph 2(a)(b)(c)(d)(e) and (f).
- 28. **Respondent's Exhibit 2** The ALJ's granting of Counsel for the Acting General Counsel's Petition to Revoke the Subpoena Duces Tecum served by Respondent on the Speaker's Bureau, NLRB, Region 3, Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, New York seeking the following:

"For the period from January 1, 2006 through October 12, 2010, all documents regarding any speakers, meetings, presentations, inservice, conferences and/or seminars presented to employees of Hispanics United of Buffalo, Inc., at 254 Virginia Street, Buffalo, New York, 14214." Tr. pgs. 20-21; GC Ex. 24.

29. **Respondent's Exhibits 3 through 7** The ALJ's granting of Counsel for the Acting General Counsel's Petition to Revoke the Subpoena Duces Tecum served on Mariana Cole-Rivera, Ludimar Rodriguez, Damicela Rodriguez, Yaritza Campos and Carlos Ortiz. Tr. pgs. 22-25; GC Ex. 25.

30. **Transcript at pgs. 191-193** The ALJ's sustaining of General Counsel's objection during the cross-examination of alleged discriminatee, Ludimar Rodriguez as follows:

"Q. Let's start with this. How many times have you spoken to Mr. Sukert about this case?

Mr. Sukert; Objection, Your Honor.

Judge Amchan: Sustained.

Mr. Gomez: Your Honor, he does not represent this individual.

Judge Amchan: Yeah, but so what?

31. **Transcript at pgs. 318-319** The ALJ's sustaining of the objection by General Counsel during the cross-examination of Mariana Cole-Rivera during the following exchange:

- Q. Did you ask Andrea her opinion about these working conditions at HUB?
- A. We didn't talk about working conditions at HUB.
- Q. What did you talk to her about then?
- A. We talked about the Facebook postings.
- Q. What about the postings?
- A. If she had seen them, you know, and that after everything was said and done that I was going to talk to, you know, Lourdes on Tuesday, and - I mean, you know, when we came back to work.
- Q. So you don't believe that the Facebook posts were about working conditions?

Mr. Sukert: Objection.

Judge Amchan: They are what they are.

32. ALJ Exhibits 1 through 5 The ALJ's denial of Respondent's request for unredacted documents produced by General Counsel and identified as Jencks materials regarding witnesses that were identified by the alleged discriminatees that did not work for Respondent at the time of the termination of the five employees, or at the time of the hearing.

Based upon all of the foregoing stated Exceptions, and as supported by the accompanying Brief in Support of the Exceptions, on behalf of Respondent, Hispanics United of Buffalo, Inc., it is respectfully submitted that the unlawful labor practice charge herein be dismissed in its entirety.

Dated: October 21, 2011 Buffalo, New York

Respectfully submitted,

Raffael O. Gomez, Esq.

LO TEMPIO & BROWN, P.C. Attorneys for Respondent -

Hispanics United of Buffalo, Inc.

One Franklin Court 181 Franklin Street

Buffalo, New York 14202

(716) 855-3761

rgomez@lotempioandbrown.com

## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

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and

Case 3-CA-27872

CARLOS ORTIZ, AN INDIVIDUAL

# RESPONDENT, HISPANICS UNITED OF BUFFALO, INC.'S REQUEST FOR ORAL ARGUMENT REGARDING THE EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent, Hispanics United of Buffalo, Inc., (hereinafter referred to as "HUB"), by and through their attorneys at LoTempio & Brown, P.C., hereby respectfully requests Oral Argument regarding the Exceptions to the Decision of the Administrative Law Judge dated September 2, 2011.

Dated: October 21, 2011 Buffalo, New York

Respectfully submitted,

LO TEMPIO & BROWN, P.C.

Attorneys for Respondent

Rafael O. Gomez, Esq.

Hispanics United of Buffalo, Inc.

One Franklin Court
181 Franklin Street

Buffalo, New York 14202

(716) 855-3761

rgomez@lotempioandbrown.com

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#### CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Exceptions and Request for Oral Argument regarding the Exceptions was electronically served on October 21, 2011, on the following:

- Aaron B. Sukert, Esq.
   Counsel for the Acting General Counsel
   National Labor Relations Board, Region 3
   Niagara Center Building Suite 630
   130 South Elmwood Avenue
   Buffalo, New York 14202
   aaron.sukert@nlrb.gov
- 2. Carlos Ortiz
  Charging Party
  carlosodj@gmail.com

DATED: October 21, 2011 Buffalo, New York

LO TEMPIO & BROWN, P.C.

Attorneys for Respondent

Hispanics United of Buffalo, Inc.

One Franklin Court 181 Franklin Street Buffalo, New York 14202 (716) 855-3761